

that the incriminating articles obtained as a result of the search were recovered as alleged and leaves no room for doubt and to exclude the possibility of any concoction or malpractice of any kind. This section bears some resemblance to section 103 of the Indian Criminal Procedure Code which is more exhaustive than ours. Conviction or acquittal of an accused person invariably depends upon the credibility of witnesses as assessed by the trial court and never on the question whether a particular legal procedure has been complied with. The most that can be said about the failure to comply with the provision relating to search list is that it may cast doubt upon the *bona fides* of the parties conducting the search and accordingly afford ground for scrutiny; but if after close scrutiny the court arrives at the conclusion that the stolen articles were recovered from the possession of the accused person, it is obviously no defence to say that the evidence was obtained in an irregular manner. There is nothing in the law which makes such evidence inadmissible. (See *Bashir v. Emperor*; ⁽⁶⁾ *Bhattacharjee v. Emperor* ⁽⁷⁾). In the present case the learned president had explored the evidence and came to the conclusion that the stolen articles were recovered from the possession of the appellant. I am therefore unable to see how the failure to prepare a search list by itself would entitle the appellant to an acquittal.

The facts do not justify the conclusion of guilt under section 454 of the Penal Code. Nine weeks is quite a long time to justify the presumption that the appellant stole the money. It is not possible to dismiss from my mind that during that period the stolen articles had not passed from hand to hand. Be that as it may, the facts favour the inference that the appellant dishonestly retained the stolen articles. It is my view that there is ample material before the court to justify the conclusion that the appellant dishonestly retained the stolen articles.

The conviction under section 454 of the Penal Code is therefore set aside.

Instead, I substitute it with a conviction under section 411 of the Penal Code.

The facts of this case do not justify a sentence of three years' imprisonment. A more appropriate sentence in the circumstances would be that of 18 months.

Order accordingly.

Solicitors: Oorjitham & Lam.

A CHANG KIM SIONG v. PUBLIC PROSECUTOR

[F.C. (Pike C.J. (Borneo), Gill & Chang Min Tat JJ.)
September 11, 1967]

[Kuching — Federal Court Criminal Appeal No. X. 20
of 1967]

Criminal Law and Procedure — Identification — Accused identified at identification parade by witness who previously had opportunity of seeing him at the police station — Identification vitiated — Circumstantial evidence must point only to guilt of accused.

Evidence — Circumstantial evidence — Onus on prosecution.

The appellant appealed against his conviction and sentence for murder. The substantial point for the consideration of the court was the evidence of identification of the accused by a prosecution witness, to the effect that the accused was the person alleged to be at a certain place and certain time on a certain date.

The fact was that this witness had been given an opportunity by the police to see the accused prior to the formal identification at the identification parade.

Held: (1) since the witness had opportunity to see the accused beforehand, the evidence of subsequent identification at the parade by him was vitiated;

(2) the other evidence being of a circumstantial nature, it could not be said that such evidence pointed irresistably to the guilt of only the accused;

(3) the onus on the prosecution when the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistably to the conclusion of the guilt of the accused.

FEDERAL COURT.

S. K. Reddi for the appellant.

C. J. Millar (Deputy Public Prosecutor) for the respondent.

Pike C.J. (Borneo): The appellant has appealed against his conviction and sentence for murder.

We are indebted to counsel for the appellant and to counsel for the prosecution for their assistance. It has seemed to us that there is really only one point in this case which deserves the careful consideration of the court, and that is the question of the evidence of identification of the accused as the person alleged to be at the bridge on the 28th of December.

If the accused had been identified at an identification parade by the witness, Simon Liew, without that witness having been first afforded the opportunity of seeing the accused, we feel that there might well be sufficient evidence to justify the conviction. The onus on the prosecution when the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistably to the conclusion of the guilt of the accused. If there are gaps in it then it is not sufficient. The fact that Simon Liew was invited to the police station to identify the accused not only in our opinion vitiates the subsequent identification at the parade, but raises the most grave doubts as to the whole of his evidence of identification, particularly bearing

in mind the circumstances in which he was required to perform that identification.

On the 28th of December when he is alleged to have seen the accused it was getting dusk, the identification was in poor light at best. The accused was some 160 feet away from him and was travelling on a bicycle, and according to the witness, Simon Liew, he could see the side of the face and head and forehead. Those are not circumstances most ideally suitable for clear and definite identification, and we feel that the fact that he was summoned to the police station may be indicative of some doubt in his own ability to identify the person whom he saw on the 28th. He has all along been sure that the accused was the person he saw on the 22nd, but on that day he was much nearer to the person whom he identified and had a much better opportunity of identifying. I do not think that the witness has been deliberately lying. He appeared to the learned judge to be an honest witness, and we have no reason to doubt that this is so, but there is the danger that he was uncertain as to his ability to identify and the fact that he was given the opportunity of seeing the witness at the police station may be some support for this, but more seriously it would tend to condition his mind to the belief that the person whom he was looking at was the person whom he had seen on the 28th of December. Having been invited to the police station to identify someone, even though he was not told what person he was to identify, the moment he saw the relatives of the deceased sitting there, he would clearly come to the conclusion that the person who had been arrested had been arrested in connection with the murder of the deceased.

We therefore feel that the conviction cannot stand, and the conviction must be set aside and the accused must be discharged.

What the police may choose to do with the accused in view of his illegal status in Sarawak is a matter entirely for them.

The court also directs that a copy of the evidence of Mr. Simon Liew should be sent to the commissioner of police so that suitable action may be taken against the police officer responsible for the scandalous behaviour in taking a witness to the police station so that he could identify an accused person before an identification parade was held.

Conviction set aside.

NG SHIN HON v. CHOW WAI CHUANG

[O.C.J. (Chua J.) September 12, 1967]

[Singapore — Suit No. 1606 of 1966]

Tort — Negligence — Concealed danger — Whether a trap — Engineer injured while inspecting works carried out by contractor — Contractor's duty to take reasonable care.

Damages — Pubic bone — Fracture of inferior ramus of left pubic bone — Muscle weakness — Aggravation of pre-existing osteo-arthritis of spine and hips.

The defendant was a contractor carrying out certain works on the land forming part of Monk's Hill School under a contract with the Government of Singapore. The plaintiff was an engineer of the P.W.D. who was responsible for the inspection of the execution of the defendant's contract. While inspecting the site one morning the plaintiff came across some thin metal sheets lying on the ground. He walked on the metal sheets thinking them to be lying on firm ground. However the metal sheets had been used to cover a trench which the defendant had dug (without the instructions of the plaintiff) and as a result the plaintiff suffered a fracture of the inferior ramus of the left pubic bone. In an action for damages:

Held: (1) the contractor was under a general duty to take reasonable care to prevent damage to persons whom he may reasonably expect to be affected by his work whether as invitees or licensees or other contractors. In this case the defendant did not fence the trench but instead covered it with thin metal sheets and created a concealed danger unfenced and without warning. The defendant had no right to set a trap for the plaintiff whom he knew would come on the land. The defendant was therefore negligent;

(2) the plaintiff was not negligent in walking over the metal sheets because he had no reason to believe that there might be danger in walking on them;

(3) although the plaintiff had recovered from his injury there was residual functional impairment in the form of muscle weakness and an aggravation of pre-existing osteo-arthritis of the spine and hips and a superimposed rheumatic affection of the sciatic nerve. Taking all the circumstances into consideration the plaintiff should be awarded \$5,000 general damages.

Cases referred to:—

(1) *Clayard v. Dethick* 116 E.R. 932.

(2) *Corby v. Hill* 140 E.R. 1209.

(3) *Kimber v. Gas Light & Coke Co.* [1918] 1 K.B. 439.

CIVIL SUIT.

Denis Murphy for the plaintiff.

K. C. Chan for the defendant.

Cur. Adv. Vult.

Chua J.: The plaintiff's claim against the defendant is for damages for personal injuries, loss and damage suffered by the plaintiff and caused by the negligence of the defendant, his servants or agents.

The plaintiff's evidence is shortly as follows. On and before the 1st March, 1966, the defendant was carrying out under a contract with the Government of Singapore certain works on the land forming the curtilage of Monk's Hill School in connection with an extension of the school by adding an additional floor to the building and constructing a staircase leading up to it. The plaintiff was at all material times an engineer of the Public Works Department and it was part of his duties as such engineer to inspect from time to time the execution of the defendant's contract. Piles were driven at two sites, at one